IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 338 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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ANIL G SHAH

Versus

J CHITTRANJAN CO,

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Appearance:

MR SV RAJU for Petitioner

MR SP HASURKAR for Respondent No. 1

Ms. B.R.Gajjar, ADDL. PUBLIC PROSECUTOR for respondent no. 2.

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CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 21/10/97

ORAL JUDGEMENT

The original complainant in criminal case no. 2203 of 1992 on the file of the learned Metropolitan Magistrate, Court no. 9, Ahmedabad has filed the present Revision Application to challenge the order passed by the

learned Additional City Sessions Judge, Ahmedabad in Criminal Revision Application No. 296 of 1996 on 7th July, 1997.

2. Revision Applicant Anil G Shah is the son of late G L Shah and he was also a power of attorney holder of G L Shah when he filed criminal case no. 2203 of 1994 against the respondent for the alleged offence punshable under section 138 of the Negotiable Instruments Act, 1881.(For short "the Act"). The said criminal case no.2203 of 1994 was filed on 7th July, 1994 and the description of the complainant in the complainant is given as under:

"G.L.Shah, through authorised representative and
constituted attorney Anil G Shah,
"Sanskrut" 2nd floor, Navrangpura, Ahmedabad."

From the above description of the said complainant, it is quite clear that the complaint is lodged by the said G.L.Shah and the said complaint was filed and signed by his power of attorney holder, namely Anil G Shah. It was the allegation of the complainant in the complaint that the respondent had taken loans from time to time and towards the said loan, he was owing Rs. 1,47,600/(Learned advocate for the Revision applicant says that there is a typing mistake in the complaint and the amount is Rs.14,76,000/- and that necessary application would be filed before the learned Metropolitan Magistrate to correct the said typing mistake). The cheque which is produced alongwith the complaint clearly shows that the amount is Rs.14,76,000/-. Towards the said amount of Rs.14,76,000/- the respsondent had given cheque bearing no. 613783 dated 1.2.94 drawn on Canara Bank, Bombay. When the said cheque was presented by the complainant for its realisation,it was returned on 20.5.94 with an endorsement "funds insufficient". Thereafter, the complainant had issued the legal notice as contemplated by section 138(B) of the Act on 13.5.94. Inspite of the service of the said legal notice, as there was no payment of the amount of the cheque, this private complaint is filed on 7th July, 1994.

3. The learned Magistrate recorded the statement on oath of the complainant-constituted attorney on the same day and was then placed to issue process against the respondent respondent under section 138 of the Act.

4. On his appearance, he gave an application exh. 4 before the learned Magistrate raising a

contention therein that in view of the provisions of section 142 of the Act, the learned Magistrate was not justified in taking a cognizance of the said complaint as the complaint was not filed personally by the payee of the cheque. The learned Magistrate was pleased to reject the said contention. Thereafter, the respondent preferred Criminal Revision Application NO. 296 of 1996 before the City Sessions Court. It was the main contention of the Revision applicant i.e. respondent before me in the said Criminal Revision Application before the learned Sessions Judge that in view of the provisions of section 142 of the Act and the decision of this Court in the case of Dipendra G Choksi and others vs. Kailashchandra C Dhoot and anr. reported in 1995(1) GLR,424, the learned Magistrate ought not to have taken cognizance of the complaint and that the complaint deserves to be dismissed. The Revision applicant before me had urged before the learned Sessions Judge that in the decision of this court as regards lodging of the complaint by the company and there was no consideration of any question, in that case as to whether the complaint lodged by the power of attorney holder of a payee was a proper complaint and whether the cognizance of such a complaint could be taken under section 142 of the Act or not and it was found that the complaint whose name is described as a complainant in the complaint was not a payee of the cheque and as the of the complaint did not disclose anywhere that the complainant was the authorised agency of the company which was payee of the cheque, the cognizance of the said complaint could not be taken in view of the provisions of section 142 of the Act. Therefore, the facts of that case of the reported judgment of this Court are quite distinct and different and that they have no bearing on the facts in question. It was also urged before the learned Sessions Judge that other High Courts have specifically considered the question as to whether the complaint lodged by the power of attorney holder of the payee was a proper filing of the complaint as contemplated under section 142 of the Act and in all those cases, other High Courts have found that such a complaint was a legal and val id complaint and cognizance of the same could be taken under section 142 of the Act. But from the order of the learned Sessions Judge, it seems that he has not at all considered all those cases cited before him in proper context and has not at all tried to distinguish the said cases and to show as to how they were not applicable. He merely negatived the said contentions of the learned advocate for the Revision applicant before me and has come to the conclusion that as the complaint was not filed by the payee of the cheque, the learned

Metropolitan Magistrate was not justified in taking cognizance of the same. He therefore, allowed the said Revision Application and released the accused under the provisions of section 258 of the Code of Criminal Procedure.

5. Feeling aggrieved by the said decision, the original complainant has come before this Court.

6. Before going into details of the controversy which is raised before me, it is necessary to mention here certain admitted facts. There is no dispute about the fact that the present respondent before me had issued a cheque bearing no. 613783 dated 1.2.1994 for the amount of Rs. 14,76,000/- on his bank, i.e. Canara Bank, Bombay in favour of G.L.Shah. The said cheque was presented by the said G L Shah for realisation and the bank had informed that there could not be realisation of the amount of the cheque on account of insufficient of funds by sending necessary letter alongwith the cheque to the said G L Shah. It is also not in dispute that thereafter said G L Shah had issued a notice under section 138 of the Act calling upon the respondent before me to pay the amount of the cheque and that there was no compliance of the said demand notice and thereafter the complaint in question is lodged. Admittedly, the complaint in question is lodged by the said G L Shah through his power of attorney holder and son Anil G Shah.

7. No doubt, section 142(a) of the Act makes it quite clear that the Court shall not take cognizance of any offence punishable under section 138 except upon a complaint in writing made by the payee or the holder in due course of the cheque as the case may be. If this provision of section 142(a) is considered, then it would be quite clear that this provision is laying down a provision as to how the cognizance of an offence is to be taken. The said provision makes it quite clear that the offence punishable under section 138 is not a cognizable offence as contemplated by the Code of Criminal Procedure. In the case of a cognizable offence contemplated by Code of Criminal Procedure, it is a settled law that anybody can set law in motion by lodging a complaint. But in view of the provisions of section 142 of the Act, cognizance of the offence could be taken only in case if the complaint is lodged either by payee or the holder in due course of the negotiable instrument. As it is an admitted fact that the complaint in question was lodged by the power of attorney holder of the original payee, it would be necessary to revert to the provisions of section 2 of the Powers of Attorney Act,

1882. The said section 2 runs as under:

> "2. Execution under power of attorney :- The donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signasture and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof."

If the above provision of sub-section (2) is considered, then it would be quite clear that in view of the provisions of the said section, an act committed by the holder of the power of attorney would be presumed to be an act committed by the person who gives power of attorney. Therefore, in view of this specific provision of section 2 of the Powers of Attorney Act, 1882, it would have to be presumed as per law that the complaint lodged by the power of attorney holder is a complaint lodged by the payee. Learned advocate for the respondent Mr. Hasurkar vehemently urged before me that section 142 (a) of the Act does not incorporate that the court should take the cognizance of complaint lodged by the payee's power of attrorney holder and therefore, the Court cannot hold that the power of attorney holder's act is an act of the payee. He further contended before me that if this Court holds that the power of attorney can lodge a complaint then this court would be legislating what is not legislated by the Legislature, while framing section 142 of the Act. But what is being considered by me in this case is as to whether taking of the cognizance of a complaint lodged by a power of attorney holder of a payee could be said to be legal in a complaint filed by the payee. I can refuse to take cognizance of the offence punishable under section 138 only in case if it is found by me that the complaint lodged is not lodged by the payee. If the payee is empowered by the provisions of the Powers of Attorney Act, 1882 to empower other persons to act on his behalf and thereby to bind himself,then it could not be said that his acting under the said provisions is illegal and invalid.

8. The view which I have taken is supported by the decision of the Kerala High Court, Madras High Court, Calcutta High Court and Punjab and Haryana High Court. In the case of Hasma vs. Ibrahim, reported in

1994(1) Bank Commercial Law Reporter,159, His Lordship K T Thomas, (as he then was) has observed in paras 7 and 8 as under for holding that the power of attorney holder of a payee can lodge a complaint under section 142 of the Act.

"7. In considering the question involved here legal position regarding the right of a person to appoint another as his agent to be understood at least in a general manner. According to the law of England "every person who is suit jurist has a right to appoint an agent for any purpose whatever and tht he can do so when he is exercising a statutory right no less than when he is exercising any other right" (vide Jackson and Co. vs. Napper (1986) 35 Ch.D, 162 at page 172(. This was recognised as a common law right. Blackburn, J has stated in Queen vs. Justices of Kent (1873) 8 Q.B. 305 that " at common law, when a person authorises another to sign for him, the signature of the person so signing is the signature of the person authorizing it". The Supreme Court has declared in a decision that the law in India is also the same (vide Revulu Subbarao vs. I.T.Commr. 1956 SC,604) Venkatarama Ayyar, J in the said decision has observed that the said rule is subject to certain well known exceptions such as, when the act to be performed is personal in character, or when the act to be performed is annexed to a public office, or to an office involving any fiduciary obligation. " But apart from such exception, the law is well settled that whatever a person can do himself, he can do through an agent" observed the learned Judge in the said decision. The above can thus be regarded as the legal position regarding the right to appoint an agent.

8. "Power of attorney" is the instrument by which a person is authorised to act as the agent of the person grating in (vide Black's Law Dictionary). In Stroud's Judicial Dictionary, power of attorney is described as "an authority whereby one is set in the turns, stead, or place of another to act for him." Stone, C.J. has adopted the said definition as effective and acceptable in Ramdeo vs. Lalu Natha AIR 1937 Nagpur,65). Section 2 of the Power of Attorney Act, 1882 empowers the donee of the power of attorney to do anything "in and with his own name and signature" by the authority of the donor of

the power. The section declares that everything so done "shall be as effectual in law as if it had been.....done by the donee of the power in the name and with the signature.....of the donor thereof" (short of the words which are not necessary in this context). In the light of such declaration, the legal position is that the power of attorney holder can do everything empowered by the donor and all such acts done by the donee shall have legal recognition and acceptance as though such acts were done by the donor himself."

9. Punjab and Haryana High Court in the case of Punna Devi and another vs. JOhn Impex (Pvt.) Ltd. and others reported in 1996(2) Banking Commercial Law Reporter, 482 has upheld the filing of the complaint by power of attorney holder on behalf of a payee by making the following observations:

"The eligibility criteria under the Negotiable Instruments Act is that the complaint should be made by the payee or as the case may be, the holder in due course of the cheque. This eligibility criteria does not get disturbed, if a Power of Attorney Agent duly constituted initiates privarte complaints, for as I have stated earlier, the Power of Attorney Agent, steps into the shoes of the payee or the holder in due course of the cheque. It is not as though, total strangers not contemplated under Section 142(a) of the Act, had initiated complaints which can be done under the general law, for there is no specific locus standi, for setting the criminal law in motion, unless as I have stated earlier, eligibility criteria intervenes. Once a Power of Attorney Agent makes the complaint, for all practical purposes, it is the payee or the holder in due course of the cheque, who is the complainant, the words "in writing" mentioned in Section 142(a) of the Negotiable Instruments Act to my mind, cannot be restricted to mean, that it must be in writing by the payee himself or the holder in due course himself, for, if it is made by the Power of Attorney Agent it tantamounts to the complaint being made by the payee or as the case may be the holder in due course of the cheque. As rightly pointed out by one of the counsel, the words "in writing" appear to have been introduced under Section 142(a) of the Act, contra distinguished from Section 2(d) of the Criminal Procedure Code,

which postulates an oral complaint as well."

10. The same view is also taken by the Calcutta High Court in the case of Sk. Aabdur Rahim vs. Amal Kumar Banerjee and State of West Bengal, reported in 1994(2) Current Criminal Reports, 1040.

11. It must be remembered that Section 142 does not lay down that the complaint must be filed by the payee personally. If the interpretation which learned advocate for the respondent wants me to accept, then it would mean that the complaint must be filed by the payee personally. When section 142 itself does not specifically say that the complaint must be lodged by the complainant personally and when it is also not the case of the public officer lodging the complaint, the lodging of the complaint by the power of attorney holder of the payee could not be said to be illegal or invalid. The learned Sessions Judge has not properly considered the decision of this Court reported in 1995(1) GLR,424 in its proper context. It seems that he has been misled by mere head-note and he has not gone through the said decision. The following observations in the said judgment would clearly show that the said judgment is not applicable to the facts of the case before me.

12. The learned advocate for the respondent has drawn my attention to the following commentary in Broom's Legal Maxims, 10th Edition, page 306.

"It is then true that, "when the words of a law extend not to an inconvenience rarely happening, but do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is casus omissus, and that the law intended qua frequentius accidunt". "But" on the other hand " it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, thast they should not extend to it as well as if it happened more frequently, because it happens but seldom" (a) A casus omissus ought not to be created by interpretation, save in some case of strong necessity (b) Where, however, a casus omissus does really occur, either through the inadvertence of the legislature (c) or on the principle quod semel aut bis existit proetereunt legislatores (d), the rule is that the particular case, thus left unprovided for, must be disposed of accofrding to the law as it exixted before

such statute- Casus omissus et oblivioni datus dispositioni communis juris relinquitur(e) "a casus omissus" observed Buller, J (f) "can in no case be supplied by a court of law, for that would be to make laws"

13. In my opinion, the above observations are not at all helpful to the respondent in the case in question and they do not support his contention. On the contrary, they support the view taken by me. The view taken by me also gets support from the observations of the Apex Court in the case of Vishwa Mitter vs. O.P. Poddar and others reported in AIR 1984 SC, page 5. Para-6 which runs as under:

"6. Even otherwise in the absence of a specific qualifiction, if the person complaining has a subsisting interest in the protection of the registered trade mark, his complaint cannot be rejected on the ground that he had no cause of action nor sufficient subsisting interest to file the complaint. M/s Mangalore Ganesh Beedies Works, a partnership firm is the registered owner of trade marks, falsification and infringement of which is complained by the present complainant wh o is not only a dealer in these beedies manufactured and sold by the registered owner of the trade marks, but he is also the constituted attorney of the owners of the registered trade mark. To say that the owner of the registered trade mark can alone file the complaint is contrary to the provisions of the statute and commonsense and reason. Therefor, the order of the learned Magistrate dismissing the complaint at the threshold on the ground thast the present appellant has no cause of action to file the complaint is utterly unsustainable and must be quashed and set aside. Surprisingly, the High Court dismissed the revision petition of the complainant in limine which order is equally unsustainable and must be set aside."

14. Therefore, in view of the above discussion, I hold that the learned Sessions Judge was not at all justified in interfering with the order passed by the learned Metropolitan Magistrate by allowing the Revision Application filed by the respondent and in view of the above discussion, it would be quite clear that his conclusion that cognizance of the complaint ought to have

been taken in view of the provisions of section 142 of the Negotiable Instruments Act is erroneous and the same deserves to be interfered with by exercising revisional jurisdiction.

15. The next contention which is raised on behalf of the respondent is also of technical nature. It is urged on behalf of the respondent that after lodging of the complaint, the original complainant G.R.Shah has died. G.R.Shah has died on 20.8.94. The complaint in this case was lodged on 7.7.94. The learned Metropolitan Magistrate has issued process against the respondent on the same day, i.e. on 7th July, 1994. Once the learned Metropolitan Magistrate issues process, it is quite obvious that he has taken cognizance of the offence. Once the Magistrate happens to take cognizance of the offence, the death of the payee of the cheque has no bearing on the trial in question. Had there been the death of the payee of the cheque before the Magistrate had taken cognizance of the offence, then there would have been a question as to whether cognizance of the offence could be taken, but that question does not arise now in view of the fact that the Magistrate has already taken cognizance of the matter. Once cognizance of the offence has been taken by the Magistrate, the trial will have its end after following due process and procedure as laid down in the Code of Criminal Procedure. There is no provision in the Code of Criminal Procedure or in the Negotiable Instrument Act laying down that on account of death of the payee, the trial must abate. When there is no such provision either in the Code of Criminal Procedure or in the Negotiable Instrument Act, then merely because the original complainant-payee has died, there could not be abatement of the proceedings. The legal heirs of the original complainant are entitled to come forwrd and ask for their substitution in place of the complainant so as to proceed further with the trial. In the case of T.N.Jayarasan vs. Jayarasan, reported in 1992(3) Crimes, 666, this question of death of payee-complainant and the consequences of the same has been considered and it has been held that the Magistrate can grant permission to the son of the deceased complainant to proceed with the complainant. The same view is also taken by the High Court of Jammu and Kashmir in the case of Ashok KUmar vs. Abdul Latif and others reported in 1989 Criminal Law Journal, 1856 and by the Andhra Pradesh High Court in the case of Maddipatta Govindaiah Naidu and others vs. Yelakaluri Kamaalamma and others reported in 1984 Criminal Law Journal, 1326. In my opinion, the view by all these three High Courts is proper and must be followed. As stated earlier, once

cognizance of the case has been taken by the Magistrate, the case must have its end according to law and when there is no provision in the Code of Criminal Procedure to the effect that on account of the death of the complainant, abatement of the case must take place, it is not open for the Magistrate to dismiss the complaint by holding that it has abated on account of the death of the complainant. Therefore, in my opinion, the death of the original complainant has no bearing on the trial in question. The learned advocate for the respondent has vehemently urged before me that till today, no application is filed by the heirs and legal representatives of the original complainant, to bring them on record. But when the learned Sessions Judge has already passed an order of dismissing the complaint under section 258 and when the matter was pending in the higher forum, it was not possibssle for the heirs of the original complainant to move the Metropolitan Magistrate. The would be at liberty to take appropriate steps in view of the decision taken by this Court today.

16. Thus, I hold that the present Revision Application will have to be allowed and the order passed by the learned Sessions Judge in Criminal Revision Application No. 296 of 1996 will have to be set aside and Criminal Case No. 2203 of 1994 will have to be restored to file and the learned Metropolitan Magistrate should proceed to deal with the said criminal case according to law and pass an appropriate order on the application that may be filed before him by the legal heirs of the deceased complainant. In view of the fact that the complaint is lodged in the year 1994, the learned Magistrate should give priority to this case and dispose of the same as early as possible.

17. The learned advocate for the respondent urged before me that operation of this order passed by this Court today should be stayed as the respondent intends to approach the higher forum. In my opinion, in view of the nature of the proceedings and the fact that criminal case filed in the year 1994 has not gone beyond the stage of issuance of process and in view of the clear provision of law, it is not at all necessary to stay the operation of the order passed by this Court. I have also to state that the order passed by this Court is by exercising revisional jurisdiction and there is no necessity to stay the operation of such order. I therefore, reject his prayer to stay the operation of this order.

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